Supreme Court, U.S.
FILED
JUL 23 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BENDER,
*Attorney for Petitioner,*
225 Broadway,
New York, N. Y. 10007

Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1050-51

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTORY PROVISIONS INVOLVED | 4 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT | 11 |
| 1. The decision below approves a standard of wilfulness under 18 U.S.C. Sec. 1001 that is in conflict with that established by this Court and followed by other Circuits | 11 |
| 2. The Second Circuit in upholding the action of the trial court in deleting the charge of aiding and abetting in Counts 56-71 (including Count 62 on which petitioner was convicted) permitted an amendment of the indictment which the District Court was powerless to accomplish | 13 |
| 3. The Trial Court's order to petitioner to submit handwriting exemplars constituted a violation of his Fourth Amendment prohibition against unreasonable searches and seizures | 14 |
| 4. Can the verdict of guilt on the counts under Title 26 U.S.C. Sec. 201(f) stand when the defense of solicitation and economic coercion was taken from the jury on these counts although allowed on the bribery counts under Section 201(b) | 15 |

PAGE

5. Judgment of acquittal should have been granted on Count 62 under Title 18 U.S.C. Sec. 1001 for the making of a false statement in the tax return of Sixteen Ehrling or for aiding and abetting it in view of the Congressional adoption of Title 26 U.S.C. Sec. 7207 which preempted the jurisdiction for such an offense ..... 18

CONCLUSION ..... 19

APPENDIX:

A—Opinion of United States Court of Appeals 1a

B—Judgment and Commitment ..... 9a

C—Indictment ..... 12a

**Cases Cited**

Berra v. United States, 351 U. S. 131, 76 S. Ct. 685 (1956) ..... 18

Bryson v. United States, 396 U. S. 64, 90 S. Ct. 355 (1969) ..... 12

Corcoran v. United States, 229 F. 2d 295 (5th Cir. 1956) ..... 12

Dionisio, In re, 442 F. 2d 276 (7th Cir. 1971) ..... 15

Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781 (1887) ..... 3, 13

Gilbert v. California, 338 U. S. 263, 87 S. Ct. 1951 (1967) ..... 15

Hill v. Philpott, —— F. 2d ——, 9 Cr. L. 2023 (C. A. 7) ..... 15

PAGE

Hornstein v. Paramount Pictures, 37 N. Y. S. 2d 404 (Sp. T. N. Y. Co. 1942), unanimously affirmed, 266 App. Div. 659, unanimously affirmed, 292 N. Y. 468, 66 N. E. 2d 740 ..... 17, 18

Jacobs v. United States, 359 F. 2d 960 (8th Cir. 1966) ..... 12

Neely v. United States, 300 F. 2d 67 (9th Cir. 1962) .. 12

Russell v. United States, 369 U. S. 749, 82 S. Ct. 1038 (1962) ..... 3, 13

Sansone v. United States, 380 U. S. 343, 85 S. Ct. 1004 (1965) ..... 13, 18, 19

Screws v. United States, 325 U. S. 91, 65 S. Ct. 1037 .. 12

Stirone v. United States, 361 U. S. 212, 80 S. Ct. 270 (1960) ..... 3, 13

Tomoya Kawakita v. United States, 343 U. S. 717, 72 S. Ct. 950 (1952) ..... 16

United States v. Bailey, —— F. Supp. —— (D. C. N. D. Ill. 1971) ..... 15

United States v. Barash, 365 F. 2d 395 (1966) ..... 10, 15

United States v. Gilliland, 312 U. S. 86, 61 S. Ct. 518 (1941) ..... 12

United States v. Houcks, 224 F. Supp. 778 (D. C. Mo. 1963) ..... 12

United States v. Markee, 425 F. 2d 1043 (9th Cir. 1970) ..... 12

Union Pac. R. Co. v. Public Service Commission of Missouri, 248 U. S. 67, 39 S. Ct. 24 (1918) ..... 16, 17

PAGE

**United States Constitution Cited**

Fourth Amendment ..... 3, 14, 15
Fifth Amendment ..... 15

**Statutes Cited**

18 U.S.C.:
Sec. 2 ..... 4, 6, 7, 10
Sec. 201(b) ..... 3, 5, 15
Sec. 201(f) ..... 3, 5, 6, 15
Sec. 1001 ..... 2-4, 6, 7, 9-13, 18, 19

26 U.S.C.:
Sec. 7201 ..... 19
Sec. 7206(1) ..... 13
Sec. 7206(2) ..... 4, 6, 7, 10, 13
Sec. 7207 ..... 3, 4, 18, 19

28 U.S.C.:
Sec. 1254(1) ..... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No.

NORMAN H. EGENBERG,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Norman H. Egenberg prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 26, 1971 in this proceeding.

### Opinion Below

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 441 F. 2d 441. No opinion

was rendered by the District Court for the Southern District of New York.

## Jurisdiction

The judgment of the Court of Appeals was entered on March 26, 1971. A timely petition for rehearing *en banc* was denied on May 24, 1971, but the application to continue petitioner on bail pending this application was granted. On June 15, 1971, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including July 23, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented

1. Whether, in a prosecution for the willful making or causing to be made of a false, fictitious and fraudulent statement and representation in a United States Departing Alien Income tax return (Form 1040C) in violation of 18 U. S. C. §1001, a jury verdict of guilt must be set aside where

> (a) the jury was charged that the wilfulness necessary to a violation of this section can be found if the prosecution's proof shows that petitioner acted "with reckless disregard of whether the statement on the [tax returns] was true, or if he acted with a conscious purpose to avoid learning the truth, . . ." and
>
> (b) the jury was not thereby advised that the critical element of wilfulness under Section 1001 was knowledge of the falsity of the statement on the return.

2. Whether the principles and rationale of *Ex parte Bain,* 121 U. S. 1, 7 S. Ct. 781 (1887); *Stirone* v. *United States,* 361 U. S. 212, 218-219, 80 S. Ct. 270, 274 (1960) and *Russell* v. *United States,* 369 U. S. 749, 770-771, 82 S. Ct. 1038, 1050 (1962) require the acquittal of petitioner where, notwithstanding the failure of the proof that petitioner aided and abetted violations of 18 U. S. C. §1001, the trial court upon the request of the prosecution submitted the case to the jury by deleting the aiding and abetting charge and substituting therefor a new issue whether or not petitioner alone had directly committed the offenses.

3. Did the order of the District Court compelling petitioner, over objection, to submit handwriting exemplars to the grand jury after his first indictment which were used as evidence against the petitioner at his trial constitute a violation of his Fourth Amendment prohibition against unreasonable searches and seizures?

4. Can the verdict against appellant on the gratuity* counts under 18 U. S. C. §201(f) stand where the jury was advised that they could not consider acts of solicitation and economic coercion by agents of the Internal Revenue Service as evidence in behalf of petitioner on these counts but only on the counts charging bribery under 18 U. S. C. §201(b) where the jury acquitted appellants of all such bribery counts.

5. Can a conviction on Count 62 stand for making a false statement in a return in violation of Title 18 U. S. C. §1001 on which petitioner received five years in jail and a fine of $10,000.00 in view of the enactment of Title 26

---

* This is a convenient nomenclature used by the Second Circuit although hardly fitting for a felony with a two year maximum.

U. S. C. §7207 in 1954 providing that the identical but specific offense shall constitute a misdemeanor with a maximum term of one year in jail and a fine of not more than $1,000.00?

## Statutory Provisions Involved

Title 18, United States Code, §1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statement or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, §2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 26, United States Code, §7206(2):

> "Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . .;"

Title 26, United States Code, §7207:

> "Any person who willfully delivers or discloses to the Secretary or his delegate any . . . return

> . . ., known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

Title 18, United States Code, §201(b):

> "(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official, to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act;"

Title 18, United States Code, §201(f):

> "(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;"

## Statement of the Case

Petitioner was first indicted in 1968. This was superseded January 12, 1970 in an indictment consisting of 88 counts on which he was tried below.

1. Counts 1-28 charged petitioner with bribing Internal Revenue agents to influence their decisions with respect to the audit and issuance of alien travelling permits on

Departing Alien Income tax returns (Form 1040C) and year-end returns (Form 1040B).

2. Counts 29-56 were the same facts as Counts 1-28 except that they were brought under 18 U. S. C. §201(f) and the payments and the giving of things of value were for and because of the same audits and alien travelling permits referred to in Counts 1-28.

3. Counts 56-71 charged petitioner with aiding and abetting the wilful making of false, fictitious and fraudulent statements and representations on the United States Departing Alien Income tax returns (Form 1040C) of certain named alien taxpayers, in violation of 18 U. S. C. §1001, and 18 U. S. C. §2, in that the tax returns indicated it was the intention of such taxpayers not to return to the United States when petitioner "in truth and in fact", "well knew" they intended to return to the United States.

4. Count 72 also charged petitioner with aiding and abetting the wilful making of a false, fictitious and fraudulent statement and representation on the United States Departing Income Tax return (Form 1040C) of members of the touring company of Ballet Folklorico de Mexico, in violation of 18 U. S. C. §1001 and 18 U. S. C. §2, in that the gross income of the ballet company and its members was reported as $130,717.50, whereas petitioner in truth and in fact well knew it was $277,399.72.

5. Counts 73-84 charged petitioner with aiding and abetting the wilful preparation and presentation of false and fraudulent material matters contained in United States Departing Alien Income tax returns of named alien taxpayers, in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2, in that various deductions were claimed on

those returns whereas petitioner in truth and in fact well knew they were not so entitled.

6. Counts 85-88 likewise charged petitioner with aiding and abetting the wilful preparation and presentation of false and fraudulent material matters contained in United States Departing Alien Income tax returns (Form 1040C) of named alien taxpayers, in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2, who were the same taxpayers set forth in Counts 57-71 and 72 charging petitioner with aiding and abetting the wilful making of a false statement in the United States Departing Alien Income tax returns, in violation of 18 U. S. C. §1001 and 18 U. S. C. §2.

Following a three and a half week trial, the jury on June 25, 1970 returned a verdict of not guilty on the counts described in "1"; a verdict of guilty on 22 of the counts described in "2", not guilty on five and one of which had been withdrawn by the prosecution at the close of its case; a verdict of not guilty on six counts described in "3" and guilty on Count 62, one count, 58, having been withdrawn by the prosecution at the close of its case; the prosecution withdrew the count described in "4"; a verdict of not guilty on four counts described in "5"; a verdict of guilty on two counts, 77 and 81, six other counts having been withdrawn by the prosecution at the close of its case; the prosecution, also, withdrew the counts described in "6" at the close of its case.

Upon petitioner's finding of guilt on the counts described in "1", he was sentenced to the maximum term of two years imprisonment and fined $100.00 on each of the counts; on the finding of guilt on Count 62 involving the issues charged in "3", he was sentenced to the maximum term of five years imprisonment and fined $10,000.00; on

the finding of guilt on Counts 77 and 81 described in "5", he was sentenced to the maximum term of three years imprisonment and fined $2,000.00. The prison sentences were made to run concurrently with each other, whereas the fines were aggregated totalling $16,200.00. Motions for judgment of acquittal and for a new trial were denied. On appeal, the Second Circuit affirmed the conviction.

The relevant facts underlying this conviction may be briefly stated. Petitioner is 46 years of age, has been married 21 years, has three children. He became a certified public accountant in New Jersey 16 years ago and was thereafter licensed in New York. He has no prior criminal record. His interest in the opera led to his representation of alien opera singers, alien orchestra conductors, and other alien artists. His accounting and professional experience involved the preparation and presentation of United States Departing Alien Income tax returns (1040C) and final returns (1040B). The 1040C was a sailing permit issued by Internal Revenue Service which an alien was required to have in order to leave the country. The form reflected any tax due and owing for the period less than a year that the alien was here based upon income and expense and withholding from income and any refund to which the alien may be entitled. All of these aliens were well-known professional artists. All were in the United States for a specific performance. They were thus on a travel status and were entitled to all of the expenses incurred such as travel, hotels, meals, commissions, etc. Petitioner had no written contract for his services with these artists. His understanding with them was oral and was simply to prepare their sailing permits upon information submitted to him without any audit or certification on his part as to the accuracy of the

material placed by him on the 1040C or the final return 1040B. So far as petitioner knew, there was no reason to doubt or disbelieve the material submitted to him. His work with these artists was at any and all hours. It was frequently necessary to meet them in their hotels and apartments. Because it was impossible to arouse some of these artists early enough to have them visit the Internal Revenue Service, petitioner obtained powers of attorney in accordance with Treasury regulations. In almost all of the tax returns involved in these charges, the information placed on the return came directly from the alien or the alien's wife. In only two instances involving the tax returns of Sixten Ehrling and Jon Vickers was the information supplied to petitioner by their agents. Ehrling, for example, had never met petitioner. Thus, Columbia Artists supplied the information on Ehrling and William Stein Agency on Jon Vickers. Subsequent to petitioner's first indictment in 1968, and on or about December 12, 1969, prior to the superseding indictment, petitioner was ordered by the District Court on the application of the United States of America, over objection by petitioner, to submit handwriting exemplars. These exemplars were utilized by a handwriting expert for the prosecution to indicate that by a comparison of the exemplars and some writing which appeared on some records of Columbia Artists Management, Inc., the agent for Ehrling, petitioner's handwriting appeared on those records in the files of Columbia Artists Management, Inc. Since Ehrling testified that it was his intention to return to the United States when his 1040C form was submitted, petitioner's conviction on Count 62 for submitting a false statement on the return in violation of 18 U. S. C. §1001 turned on the trial court's charge as to what petitioner's duty was in the preparation of that return. This was also true with Ehrling's and Vickers' tax returns under Counts 77 and

81 on which petitioner was found guilty of submitting tax returns containing false material matter in violation of 26 U. S. C. §7206(2) and 18 U. S. C. §2. This charge permitted wilfulness to be found on 18 U. S. C. §1001 if the jury was satisfied that petitioner had acted recklessly or with a conscious purpose to avoid the truth. The spill-over to the counts under 26 U. S. C. §7206(2) was obvious.

In 1965, the period referred to in the indictment, petitioner submitted to and obtained from various tax technicians approval of numerous forms 1040C. Two tax technicians who testified for the prosecution and to whom the petitioner submitted such forms for approval denied ever receiving or soliciting any things of value from him. Three others, Fontana, Gordon and Pacello, testified they were paid by and received gifts from petitioner. These were admittedly corrupt agents who solicited payments and gifts from tax practitioners such as petitioner. Petitioner testified that Gordon "dictated or set down standards and stated bluntly that regardless of whether they did anything or not, it is customary that you give the boys." It didn't matter, said petitioner, whether you had given to more than one agent or the same agent, "You had to take care of every one of them." If he didn't pay them, said petitioner, they threatened to disallow arbitrarily all the deductions on the alien tax returns, and to delay him in obtaining the required sailing permits. The trial court charged the jury they could consider petitioner's evidence of solicitation and economic coercion on the part of the agents on petitioner's intent to influence the agents' official action in Counts 1-28 involving the charge of bribery. But in conformity with an earlier decision of the Second Circuit Court of Appeals in *United States* v. *Barash*, 365 F. 2d 395 (1966), the jury was instructed they could not consider such evidence on Counts 29-56. The jury acquitted petitioner on all the bribery counts but convicted him on 22 of the gratuity counts.

In affirming the conviction, the Second Circuit made the following determinations:

1. With respect to the charge of falsely stating on Ehrling's return of April 17, 1965 that Ehrling did not intend to return to the United States (Count 62), the jury need only find that the petitioner acted "with reckless disregard of whether the statement was true" or "acted with a conscious purpose to avoid learning the truth."

2. The trial court was correct in withdrawing the aiding and abetting charge on the Title 18, U. S. C. §1001 counts because "at no time during the trial was any evidence presented on an aiding or abetting theory, the theory at all times being that none of the taxpayers knew of [petitioner's] fraud."

## Reasons for Granting the Writ

### 1. The decision below approves a standard of wilfulness under 18 U.S.C. §1001 that is in conflict with that established by this Court and followed by other Circuits.

The Second Circuit approved the trial judge's charge to the jury that the wilfulness essential to a conviction under Title 18 U. S. C. §1001 for wilfully making or causing to be made a false, fictitious and fraudulent statement or representation in a tax return could be found if the jury determined petitioner acted with reckless disregard of whether the statement was true or acted with a conscious purpose to avoid learning the truth. This standard is directly contradicted by the applicable decisions of this Court and of other Circuits.

Without question, the conviction on Counts 62, 77 and 81 on the tax returns of Ehrling and Vickers must be traced to this charge since it is with respect to these two

taxpayers that the information for the preparation of the tax returns came from their agents, unlike the other aliens on whose returns petitioner was acquitted.

In *Bryson* v. *United States*, 396 U. S. 64, 72, 90 S. Ct. 355, 360 (1969), this Court said with respect to the elements under Title 18 U. S. C. §1001:

> "A citizen may decline to answer the question or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood."

Previously, in dealing with a claim that the predecessor of Section 1001 was invalid as vague and indefinite in that people were not aware of what conduct was proscribed by it, the Supreme Court, in *United States* v. *Gilliland*, 312 U. S. 86, 91, 61 S. Ct. 518, 521 (1941), rejected the claim stating that the statute gives "notice of the consequence of knowingly and wilfully including therein any false and fraudulent statements." The existence of this requirement of wilfulness was similarly accepted as a reason for rejecting a claim of unconstitutional vagueness in *United States* v. *Houcks*, 224 F. Supp. 778 (D. C. Mo. 1963). The District Court noted that as long as the Government must prove wilfulness under its standard concepts, the act does not permit punishment without warning of offenses of which the accused may be unaware, citing *Screws* v. *United States*, 325 U. S. 91, 65 S. Ct. 1037.

Other Circuits have likewise required under Section 1001 that the forbidden act be done deliberately and with knowledge. *United States* v. *Markee*, 425 F. 2d 1043, 1046 (9th Cir. 1970); *Neely* v. *United States*, 300 F. 2d 67, 72 (9th Cir. 1962); *Corcoran* v. *United States*, 229 F. 2d 295, 299 (5th Cir. 1956); cf. *Jacobs* v. *United States*, 359 F. 2d 960, 966 (8th Cir. 1966), where under a similar

statute outlawing false statements to a Government agency, then Circuit Justice Blackmun said:

> "But carelessness or lack of wisdom is not equivalent to the knowledge of falsity required by the statute."

It is inconceivable that Congress intended a five year maximum term of imprisonment, which is what petitioner received, should result from a reckless statement in a tax return easily confused with gross negligence or carelessness, but that under Title 26 U. S. C. §7206(1) or (2) or Title 26 U. S. C. §7207 which are the felony and misdemeanor counterparts in the Internal Revenue Code of Title 18 U. S. C. §1001 dealing with false statements in a tax return a specific intent or knowledge would be required. Cf., e.g., this Court's opinion in *Sansone* v. *United States,* 380 U. S. 343, 350, 85 S. Ct. 1004, 1009 (1965). To permit this conviction to stand would provide the Government with a gimmick enabling it to by-pass the Internal Revenue Code relating to wilful false statements in a tax return and to bring such prosecutions in the Second Circuit under Title 18 U. S. C. §1001 in order to prove wilfulness on a vague and undefined concept of reckless conduct.

**2. The Second Circuit in upholding the action of the trial court in deleting the charge of aiding and abetting in Counts 56-71 (including Count 62 on which petitioner was convicted) permitted an amendment of the indictment which the District Court was powerless to accomplish.**

*Ex parte Bain,* 121 U. S. 1, 7 S. Ct. 781 (1887);
*Stirone* v. *United States,* 361 U. S. 212, 218-219, 80 S. Ct. 270, 274 (1960);
*Russell* v. *United States,* 369 U. S. 749, 770-771, 82 S. Ct. 1038, 1050 (1962).

In so doing, as a practical matter the petitioner was severely prejudiced in his defense to the aiding and abetting charge. The defense had concentrated on the fact that the aliens were made aware by petitioner that there could be no refund if they intended to return to the United States and yet they did not so advise the petitioner. It was, therefore, prejudicial for the court to in effect direct the jury to find that there did not exist "any basis in this case for finding that any particular alien actually intended to make a false statement." In substance, this was a further direction to the jury that they could disbelieve the petitioner's testimony.

The corrected charge, therefore, not only withdrew the aiding and abetting portion which, it is submitted, was improper, but it buried the petitioner insofar as the defense relied upon the credibility of his testimony as to his conversations with the alien artists as to their intention to return to the United States.

**3. The Trial Court's order to petitioner to submit handwriting exemplars constituted a violation of his Fourth Amendment prohibition against unreasonable searches and seizures.**

The Second Circuit indicated that the United States proved petitioner had examined Ehrling's file at Columbia Artists Management, Inc. and that this file contained several contracts obligating Ehrling to return to the United States before the end of 1965. It was because of this inferred fact under the charge of the Court that wilfulness could be found if petitioner acted recklessly, that the jury could have determined petitioner should have known. The inference that petitioner examined the file was based on some handwriting on one typed statement in the Colum-

bia file which a handwriting expert said was written by the same hand that wrote the exemplars.

The Second Circuit has interpreted an order directing a defendant to submit handwriting exemplars as under no Fifth Amendment limitations in view of this Court's opinion in *Gilbert* v. *California*, 388 U. S. 263, 87 S. Ct. 1951 (1967). However, the Seventh Circuit Court of Appeals and one District Court in the Northern District of Illinois has recently held that such "compulsory submission constitutes a seizure subject to the Fourth Amendment's prohibtion against unreasonable searches and seizures." *Hill* v. *Philpott*, C. A. 7, —— F. 2d ——, 9 Cr. L. 2023; *United States* v. *Bailey*, —— F. Supp. —— (D. C. N. D. Ill. 1971); cf. *In re Dionisio*, 442 F. 2d 276 (7th Cir. 1971). These decisions indicate that an order to provide handwriting exemplars must be justified whether the standard be probable cause or overall "reasonableness." They also make clear that a finding of probable cause does not exist merely because an indictment has been returned, but rather that there must be a further showing of probable cause to justify a specific search or seizure. No such showing was made in this case.

**4. Can the verdict of guilt on the counts under Title 26 U.S.C. §201(f) stand when the defense of solicitation and economic coercion was taken from the jury on these counts although allowed on the bribery counts under Section 201(b)?**

The charge of the trial court excluding the defense of solicitation by the agents and economic coercion on petitioner was based upon the Second Circuit's opinion in *United States* v. *Barash*, 365 F. 2d 395 (1966).

It is respectfully submitted that the exclusion of this defense is contrary to this Court's previous opinions and others which have dealt with the subject.

In *Tomoya Kawakita* v. *United States,* 343 U. S. 717, 72 S. Ct. 950 (1952), this Court recognized that acts performed under economic or other duress would not be criminal:

> "Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere nonperformance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts—if done voluntarily and wilfully —might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily 'but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion.'" 343 U. S. at 735, 72 S. Ct. at 961.

Earlier in *Union Pac. R. Co.* v. *Public Service Commission of Missouri,* 248 U. S. 67, 70, 39 S. Ct. 24, 25 (1918), this Court, speaking through Mr. Justice Holmes, stated:

> "The Railroad Company and its officials were not bound to take the risk of these threats being verified. . . . It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." 248 U. S. at 70, 39 S. Ct. at 25.

Relying on that opinion, the New York Supreme Court in *Hornstein* v. *Paramount Pictures*, 37 N. Y. S. 2d 404, 413, 415 (Sp. T. N. Y. Co. 1942). unanimously affirmed 266 App. Div. 659, unanimously affirmed 292 N. Y. 468, 66 N. E. 2d 740, ruled:

> "Statutes sometimes make the doing of an act criminal without regard to the doer's intent or knowledge . . . but I think no statute ever attempted to make involuntary action a crime." 37 N. Y. S. 2d at 413.

> "Blackmail, extortion, and an infinite variety of forms of duress have been familiarities in the law for centuries, and while they doubtless would have been wiped out long ago if all citizens refused submission, I think no instance can be found—certainly none has been cited—in which submission has been made the basis of either criminal or civil liability. On the contrary, the law always has treated the submitter to illegal exaction as a victim rather than a wrongdoer and outrager of public policy. Usury, which clearly is contrary to the public policy of this state would not exist if no citizen submitted to the exactions of the usurer, but those who do submit certainly are not classed as violators of public

policy because they thereby encourage usury and make it possible." *Hornstein* v. *Paramount,* 37 N. Y. S. 2d at 415.

**5. Judgment of acquittal should have been granted on Count 62 under Title 18 U.S.C. §1001 for the making of a false statement in the tax return of Sixten Ehrling or for aiding and abetting it in view of the Congressional adoption of Title 26 U.S.C. §7207 which preempted the jurisdiction for such an offense.**

The prosecution of petitioner under the 1001 counts resulted in a conviction on Count 62 on which petitioner was given a maximum sentence and fine of five years and $10,000.00. For the same offense, 26 U. S. C. §7207 provides a maximum punishment of one year and/or a fine not more than $1,000.00.

Section 7207 requires the filing (willful) of a return known to be false or fraudulent in many material manner. "The elements are willfulness and the commission of the prohibited act." *Sansone* v. *United States,* 380 U. S. 343, 352, 85 S. Ct. 1004, 1010 (1965).

When the prohibited act is the filing of a tax return, it is clear that the conduct which falls under Section 1001 likewise falls under Section 7207. The choice made by the prosecution here brings to mind the dissenting opinion of Mr. Justice Douglas in *Berra* v. *United States,* 351 U. S. 131, 139, 76 S. Ct. 685 (1956), that:

> "This basic principle [of fairness] is flouted if either of these statutes can be selected as to the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For the very idea that one man may be compelled to hold his life, or the means

> of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable . . .'"

Whatever may have been the concept of the applicability of Section 1001 to tax returns generally, the opinion in *Sansone* v. *United States, supra,* would seem to indicate that a change was intended by the Internal Revenue Code of 1954.

> "Congress specifically stated that it placed all these provisions [penalty provisions] in the same part of the Code because it wished them to apply to taxes generally, including income taxes." *Sansone* v. *United States,* 380 U. S. *supra* at 348, 85 S. Ct. *supra* at 1008-1009.

The Supreme Court in *Sansone* concluded that Section 7207 was a lesser included offense to a charge of attempting to evade a tax by filing a false return under 26 U. S. C. §7201. The use of §1001 as a vehicle for this offense is thus an unwarranted interference with the Congressional policy and it was also improper as an unconstitutionally broad discretion to proceed under either the misdemeanor or felony statutes.

## CONCLUSION

**For these various reasons, this petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

LOUIS BENDER,
*Attorney for Petitioner.*

[APPENDICES FOLLOW]

# APPENDIX A

**Opinion of United States Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 600—September Term, 1970.

(Argued January 22, 1971 Decided March 26, 1971.)

Docket No. 35447

---

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

NORMAN H. EGENBERG,

*Defendant-Appellant.*

---

Before:

MEDINA, HAYS and ANDERSON,

*Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* convicting appellant, Norman H. Egenberg, after a jury trial, on twenty-two counts for unlawful payment of gratuities in violation of 18 U.S.C. §201(f) (1964) and on three counts for filing false statements in

violation of 18 U.S.C. §1001 (1964) and 26 U.S.C. §7206(2) (1964).

Affirmed.

JAMES T. B. TRIPP, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Henry Putzell, III, Charles B. Updike, Assistant United States Attorneys, on the brief), *for Appellee.*

LOUIS BENDER, New York, N. Y., *for Appellant.*

HAYS, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York convicting appellant on twenty-two counts charging unlawful payment of gratuities in violation of 18 U.S.C. §201(f) (1964) and on three counts for filing false statements in violation of 18 U.S.C. §1001 (1964) and 26 U.S.C. §7206 (2) (1964). The court imposed a two-year sentence of imprisonment and a $100 fine for each of the twenty-two gratuity counts; a five-year sentence and a fine of $10,000 on the first of the false-statement counts; and a three-year sentence and a $2000 fine on each of the remaining false-statement counts. The prison sentences are to run concurrently.

We affirm the convictions.

Appellant Egenberg, a certified public accountant, represented a number of European musicians and singers before the Alien Tax Section of the Internal Revenue Service. Among the services he rendered was the preparation of Departing Alien Income Tax Returns (Form 1040C) as

well as the ordinary year-end returns (Form 1040B). By stating in connection with Form 1040C that he did not intend to return to the United States before the end of the year, an alien taxpayer could secure an immediate refund of any excess in taxes withheld.

In the returns he filed appellant grossly inflated his clients' deductions for such expenses as outlays for commissions, secretary-interpreters, coaching, publicity, voice training, accompanists, gratuities, copyright fees, as well as the expenses of travel, hotels, and meals when engaged for a specific performance. In order to assure that these returns would not be questioned Egenberg made payments to Vincent Fontana, Solomon Gordon and Raphael Pacello, Alien Tax Section technicians whose duty it was to examine the returns. In 1964 when a new policy required taxpayers to substantiate deductions, appellant began submitting as such substantiation forged or altered documents.

Appellant's unlawful activities were discovered when Vincent Fontana confessed in late 1964 that he had participated in widespread corruption in the Alien Tax Section. Fontana remained in his position by arrangement with the Inspection Service of the Internal Revenue Service and reported in a daily log evidence of graft that came to his attention. This cooperation led to the arrest of the appellant and tax technicians Gordon and Pacello in January 1966.

Fontana testified that during the period from January 1965 to January 1966 he examined at least thirty returns prepared and filed by the appellant and that appellant made ten cash payments to him during the same period. Fontana testified that he accepted deductions which he

knew were excessive and which were unsubstantiated and that he did not question appellant's representation that such Metropolitan Opera regulars as Tebaldi, Konya, Nilsson, Tucci, and Stratas did not intend to return to the United States later during the year 1965. Twenty of the thirty returns examined by Fontana showed a net loss.

Gordon testified that Egenberg paid him between $500 and $600 in six or seven payments during 1965 and that Egenberg had made similar payments every year since 1960. At least twenty returns submitted by Egenberg during 1965 were examined by Gordon.

In exchange for favorable treatment of the returns he had filed, appellant allowed Pacello to use his credit cards. During 1965 at least fifteen returns filed by Egenberg were examined by Pacello. About half of them showed net losses.

The return filed by appellant for Sixten Ehrling, permanent musical director of the Detroit Symphony Orchestra, showed gross income from January 1, to April 15, 1965 of $14,492.08 with expenses totalling $13,081.11. Ehrling testified that his commissions were 20 per cent of gross income, not the 30 per cent reported by appellant, that his publicity expenses were $10.61 not $1,575 and that he had no expenses for a secretary-interpreter or accompanist claimed by appellant to have been $575 and $340. Egenberg indicated in connection with filing Ehrling's Form 1040C that Ehrling did not intend to return to the United States after April 15, 1965, although Ehrling was at that time under obligation to conduct the Detroit Symphony Orchestra at special appearances during the summer and during its regular 1965-1966 season in the fall.

*Appendix A*

The return filed by appellant for Jonathan Vickers, noted Metropolitan tenor, for the period from February 20 to June 15, 1965, showed gross income of $32,525 from the Metropolitan Opera Company with total expenses of $13,638.75 consisting principally of a commission figured at 30 per cent of gross income and a publicity charge of $2876.60. Vickers testified that he had never seen the return and had not signed it, that his commissions were 10 per cent of his gross income, and that he had no publicity expenses whatsoever during the period.

The government also introduced the testimony of Margot Fonteyn, Joseph Witt, Adriano Petronio, Renata Tebaldi, Dandor Konya, and Raina Kabaiwanska to show that their returns claimed deductions for expenses which they had never incurred.

The appellant testified in his own behalf at the trial, admitting that he had made some payments to Fontana, Gordon and Pacello, but claiming that it was necessary to do so in order to prevent delay and interference in the processing of his clients' returns. He maintained that all information supporting deductions came directly from the taxpayers.

Appellant raises many points as grounds for reversal, but only a few of them merit discussion.

Appellant argues that the court erred in submitting the twenty-seven bribery counts to the jury with the alternative gratuity counts on the theory that this joint submission suggested to the jury that the defendant was guilty either of bribery or of paying unlawful gratuities. We do not agree. The evidence was uncontradicted that appellant made repeated payments to the three tax tech-

nicians who reviewed his returns. Only the purpose of these payments was at issue. While the jury acquitted the appellant on the bribery counts, the evidence was clearly sufficient to warrant their submission to the jury. Any possibility that the jury might have concluded from the submission of both the bribery and gratuity counts that appellant must have been guilty of one or the other was removed by the trial judge's charge. The charge carefully distinguished between the two offenses and instructed the jury that the "defendant can be acquitted of both or found guilty on one or the other . . . ."

Appellant next argues that the court erred in allowing the admission of a number of tax returns for a period prior to the period referred to in the indictment. In light of appellant's defense that he made payments to the tax technicians only under duress and that he did not know that the returns contained false information, the fraudulent tax returns were clearly admissible to show motive and criminal intent. *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114, 117-18 (2d Cir. 1967). The fact that appellant had long been filing fraudulent tax returns on behalf of his clients was highly probative of his motive in paying off the agents who were charged with the duty of scrutinizing those returns. We note also that the court in the charge carefully limited the purpose for which the jury was to consider this evidence.

Appellant contends that the trial court unfairly restricted his cross-examination of Fontana, Gordon, and Pacello, the tax technicians, as to their motives for testifying. The record, however, shows that the appellant had an extensive opportunity to cross-examine on these mat-

ters. There are ninety pages of cross-examination of Fontana, over one hundred pages for Gordon, and forty-five pages for Pacello. Both Gordon and Pacello were questioned concerning their possible motives to testify falsely in exchange for favorable treatment from the government. Appellant was limited only when he continued to press repetitious questions.

Appellant claims that there was insufficient evidence to sustain a conviction on the charge of falsely stating on Sixten Ehrling's return of April 17, 1965 that Ehrling did not intend to return to the United States. The government proved that appellant had examined Ehrling's file at Columbia Artists Management, Inc., and that this file contained several contracts obligating Ehrling to return to the United States before the end of 1965. The court correctly charged that in order to convict under 18 U.S.C. §1001 (1964) the jury need only find that the defendant acted "with reckless disregard of whether the statement . . . was true" or that appellant "acted with a conscious purpose to avoid learning the truth." *See United States* v. *Abrams*, 427 F.2d 86, 91 (2d Cir. 1970).

Appellant contends that the court's comments concerning 18 U.S.C. §2 (1964), the aiding-and-abetting section, in its charge to the jury on Section 1001 counts, confused the jury. The record shows that when appellant excepted to the charge, the court recharged on the subject, stating explicitly that the jury could not convict appellant on an aiding-and-abetting theory but only as the principal. The appellant thereupon expressed his complete satisfaction with the charge on this point. At no time during the trial was any evidence presented on an aiding-or-abetting theory, the theory at all times being that none of the tax-

payers knew of appellant's fraud. The corrected charge was adequate to withdraw the inapplicable aiding-and-abetting section from the jury's consideration.

Appellant's other claims are without merit and do not require discussion.

Affirmed.

# APPENDIX B

**Judgment and Commitment**

(Filed—July 30, 1970)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

*v.*

NORMAN H. EGENBERG,

No. 70 CR 23

---

On this 30th day of July, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully & knowingly giving, offering & promising things of value to Tax Technicians of the Internal Revenue Service, United States Treasury Department, for & because of official acts performed & to be performed by such public officials in connection with tax examinations of departing aliens, (Title 18, United States Code, Sections 201(f) and 2); unlawfully, wilfully & knowingly making false, fictitious & fraudulent statements & representations on U.S. Departing

## *Appendix B*

Alien Income Tax Returns, knowing same to be false, fictitious & fraudulent, (Title 18, United States Code, Secs. 1001 & 2); unlawfully, wilfully & knowingly aiding & assisting in, procuring, counseling & advising the preparation & presentation to the District Director of Internal Revenue of U.S. Departing Alient Income Tax Returns which were fraudulent and false as to material matters. (Title 26, United States Code, Section 7206(2) & Title 18, United States Code, Section 2.) as charged in cts. 30, 31, 32, 34, 35, 37 thru 47, 49, 50, 51, 53, 54, 56, 62, 77 & 81 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS and FINED $100.00 on each of counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54 and 56. FIVE (5) YEARS and FINED $10,000.00 on count 62. THREE (3) YEARS and FINED $2,000.00 on counts 77 and 81. The prison sentences imposed on each counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54, 56, 62, 77 and 81 are to run CONCURRENTLY with each other. The fines totalling $2,200.00 on counts 30, 31, 32, 34, 35, 37 thru 47 inclusive, 49, 50, 51, 53, 54 & 56, the fine of $10,000.00 on count 62 and the fines totalling $4,000.00 on counts 77 & 81 are to be paid or the defendant is to stand committed until the total fines are paid or he is otherwise discharged according to law.

*Appendix B*

The defendant is continued on his present bail to post bail pending appeal fixed in the sum of $3,500.00 and upon the conditon he files his appeal in ten (10) days.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDMUND L. PALMIERI
*United States District Judge*

JOHN LIVINGSTON
*Clerk.*

# APPENDIX C

## Indictment

(Filed—January 12, 1970)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

*v.*

NORMAN H. EGENBERG,

Defendant.

---

COUNTS ONE THROUGH TWENTY-EIGHT

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York, NORMAN H. EGENBERG, the defendant, unlawfully, wilfuly and knowingly, directly and indirectly, did corruptly give, offer and promise things of value as hereinafter set forth, to public officials of the United States, as hereinafter set forth, who were then and there officers, employees and persons acting for and on behalf of the United States and a department and agency thereof, to wit, Tax Technicians of the Internal Revenue Service, United States Treasury Department, with intent to influence the official acts of such public officials, to influence such public officials to make opportuni-

ties for the commission of frauds on the United States; and to induce such public officials to do or to omit to do acts in violation of their lawful duties in connection with certain tax examinations of departing aliens:

| *Count* | *Approximate Date of Offense* | *Public Official* | *Thing of Value* |
|---|---|---|---|
| 1 | Jan. 11, 1965 | Raphael J. Pacello | Longchamps credit card—charge of $19.33 |
| 2 | Jan. 27, 1965 | Vincent Fontana | $25.00 |
| 3 | Jan., 1965 | Solomon Gordon | $200.00 |
| 4 | Feb. 3, 1965 | Vincent Fontana | $20.00 |
| 6 | Feb. 17, 1965 | Vincent Fontana | $30.00 |
| 7 | Mar. 11, 1965 | Vincent Fontana | $50.00 |
| 8 | Mar. 12, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $30.05 |
| 9 | Mar. 12, 1965 | Vincent Fontana | $25.00 |
| 10 | Mar. 17, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $21.05 |
| 11 | Mar., 1965 | Solomon Gordon | $50.00 |
| 12 | Apr. 9, 1965 | Vincent Fontana | $25.00 |
| 13 | Apr. 16, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $34.30 |
| 14 | May 29, 1965 | Solomon Gordon | $50.00 |
| 15 | May 31, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $19.95 |
| 16 | May or June, 1965 | Solomon Gordon | $100.00 |

*Appendix C*

| *Count* | *Approximate Date of Offense* | *Public Official* | *Thing of Value* |
|---|---|---|---|
| 17 | June 2, 1965 | Vincent Fontana | $100.00 |
| 18 | June 4, 1965 | Raphael J. Pacello | Diner's Club credit card-charge of $41.05 |
| 19 | June 23, 1965 | Vincent Fontana | $40.00 |
| 20 | June 28, 1965 | Vincent Fontana | Pen |
| 21 | July 3, 1965 | Raphael J. Pacello | Diner's Club credit card-charge of $34.90 |
| 22 | Aug. 1, 1965 | Raphael J. Pacello | Diner's Club credit card-charge of $29.15 |
| 23 | August or Sept., 1965 | Solomon Gordon | $25.00 |
| 24 | Nov. 16, 1965 | Vincent Fontana | Pen & Pencil Set |
| 25 | Nov. 1965 | Solomon Gordon | $25.00 |
| 26 | Dec. 1, 1965 | Raphael J. Pacello | $25.00 |
| 27 | Dec. 1965 | Solomon Gordon | $200.00 |
| 28 | Jan. 4, 1966 | Vincent Fontana | $100.00 |

Title 18, United States Code, Sections 201(b) and 2)

COUNTS TWENTY-NINE THROUGH FIFTY-SIX

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfully, wilfully and knowingly directly and indirectly did give, offer and promise things of value as hereinafter set forth, otherwise than as provided by law for the proper discharge of official duty, to public officials of the United States, as hereinafter set forth who

were officers, employees and persons acting for and on behalf of the United States and department and agency thereof, to wit, Tax Technicians of the Internal Revenue Service, United States Treasury Department, for and because of official acts performed and to be performed by such public officials in connection with tax examinations of departing aliens:

| *Count* | *Approximate Date of Offense* | *Public Official* | *Thing of Value* |
|---|---|---|---|
| 29 | Jan. 11, 1965 | Raphael J. Pacello | Longchamps credit card—charge of $19.33 |
| 30 | Jan. 27, 1965 | Vincent Fontana | $25.00 |
| 31 | Jan., 1965 | Solomon Gordon | $200.00 |
| 32 | Feb. 3, 1965 | Vincent Fontana | $20.00 |
| 34 | Feb. 17, 1965 | Vincent Fontana | $30.00 |
| 35 | Mar. 11, 1965 | Vincent Fontana | $50.00 |
| 36 | Mar. 12, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $30.05 |
| 37 | Mar. 12, 1965 | Vincent Fontana | $25.00 |
| 38 | Mar. 17, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $21.05 |
| 39 | Mar., 1965 | Solomon Gordon | $50.00 |
| 40 | Apr. 9, 1965 | Vincent Fontana | $25.00 |
| 41 | Apr. 16, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $34.30 |
| 42 | May 29, 1965 | Solomon Gordon | $50 |
| 43 | May 31, 1965 | Raphael J. Pacello | Diner's Club credit card—charge of $19.95 |

*Appendix C*

| *Count* | *Approximate Date of Offense* | *Public Official* | *Thing of Value* |
|---|---|---|---|
| 44 | May or June, 1965 | Solomon Gordon | $100 |
| 45 | June 2, 1965 | Vincent Fontana | $100.00 |
| 46 | June 4, 1965 | Raphael J. Pacello | Diner's Club credit car charge of $41.05 |
| 47 | June 23, 1965 | Vincent Fontana | $40.00 |
| 48 | June 28, 1965 | Vincent Fontana | Pen |
| 49 | July 3, 1965 | Raphael J. Pacello | Diner's Club credit car charge of $34.90 |
| 50 | Aug. 1, 1965 | Raphael J. Pacello | Diner's Club credit car charge of $29.1 |
| 51 | Aug. or Sept., 1965 | Solomon Gordon | $25.00 |
| 52 | Nov. 16, 1965 | Vincent Fontana | Pen & Pencil Set |
| 54 | Dec. 1, 1965 | Raphael J. Pacello | $25.00 |
| 53 | Nov., 1965 | Solomon Gordon | $25.00 |
| 55 | Dec., 1965 | Solomon Gordon | $200.00 |
| 56 | Jan. 4, 1966 | Vincent Fontana | $100.00 |

(Title 18, United States Code, Sections 201(f) and 2.)

COUNTS FIFTY-SEVEN THROUGH SEVENTY-ONE

The Grand Jury further charges:

On or about the dates, hereinafter set forth in the Southern District of New York, Norman H. Egenberg, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Inter-

nal Revenue Service, United States Treasury Department, unlawfully, wilfully and knowingly did make and cause to be made false, fictitious and fraudulent statements and representations on U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department, Internal Revenue Service) of certain taxpayers, as hereinafter set forth, to wit, that it was the intention of such taxpayers not to return to the United States, whereas in truth and in fact, as the defendant well knew, it was the then present intention of said following taxpayers to return to the United States:

| *Count* | *Date* | *Taxpayer* |
|---|---|---|
| 57 | Jan. 31, 1965 | Gabriel Bacquier |
| 58 | Feb. 3, 1965 | Ingrid Bjoner |
| 59 | Feb. 20, 1965 | Paul Kletzki |
| 60 | Feb. 27, 1965 | Biserka Cvejic |
| 61 | Mar. 24, 1965 | Christa Ludwig |
| 62 | Apr. 17, 1965 | Sixten Ehrling |
| 63 | May 2, 1965 | Ernst Haefliger |
| 64 | May 30, 1965 | Ernst Wiemann |
| 65 | May 31, 1965 | Franco Corelli |
| 66 | June 4, 1965 | Sandor Konya |
| 67 | June 15, 1965 | Jon Vickers |
| 68 | June 25, 1965 | Renata Tebaldi |
| 69 | July 3, 1965 | Sandor Konya |
| 70 | Dec. 1, 1965 | Raina Kabawanska |
| 71 | Dec. 23, 1965 | Monseratt Caballe |

(Title 18, United States Code, Sections 1001 and 2.)

## *Appendix C*

### Count Seventy-Two

The Grand Jury further charges:

On or about the 25th day of April, 1965, in the Southern District of New York, Norman H. Egenberg, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Internal Revenue Service, United States Treasury Department, unlawfully, wilfully and knowingly did make and cause to be made false, fictitious and fraudulent statements and representations on U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department, Internal Revenue Service) of members of the touring company of Ballet Folklorico De Mexico, to wit, that the total United States source gross income of said ballet company and its said members during the taxable period January 1, 1965 through April 25, 1965 was $130,717.50, whereas in truth and in fact, as the defendant well knew, said total gross income was $277,399.72.

(Title 18, United States Code, Sections 1001 and 2.)

### Counts Seventy-Three Through Eighty-Four

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfuly, wilfully and knowingly did aid and assist in, procure, counsel and advise the preparation and presentation to the District Director of Internal Revenue for the Manhattan District of New York, under, and in connection with matters arising under the Internal

## *Appendix C*

Revenue laws, to wit, Title 26, United States Code, of returns, statements and other documents to wit, U.S. Departing Alien Income Tax Returns (Form 1040(c), United States Treasury Department Internal Revenue Service) for the taxpayers as hereinafter set forth, which were fraudulent and false as to material matters, in that they represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim certain deductions for items hereinafter set forth in the amounts hereinafter set forth, whereas in truth and in fact, as the defendant well knew, the said taxpayers were not entitled to claim such deductions:

| *Count* | *Date* | *Taxpayer* | *Deduction Items* | *Amount* |
|---|---|---|---|---|
| 73 | Jan. 31, 1965 | Gabriel Bacquier | Professional Training and coaching | $ 1,000.00 |
| | | | Publicity and Promotion | $ 649.69 |
| | | | Secretary, Interpreter | $ 100.00 |
| | | | Commissions | $ 1,800.00 |
| 74 | Feb. 3, 1965 | Ingrid Bjoner | Claque | $ 50.00 |
| | | | Secretary, | $ 100.00 |
| | | | Interpreter Commissions | $ 1,320.00 |
| 75 | Feb. 20, 1965 | Paul Kletzki | Accompanist | $ 450.00 |
| | | | Studio Rental | $ 275.00 |
| | | | Commissions | $ 1,447.50 |

*Appendix C*

| | | | | |
|---|---|---|---|---|
| 76 | Feb. 27, 1965 | Biserka Cvejic | Studio Rental | $ 125.00 |
| | | | Claque | $ 100.00 |
| | | | Commisions | $ 1,447.50 |
| 77 | Apr. 17, 1965 | Sixten Ehrling | Accompanist | $ 350.00 |
| | | | Studio Rental | $ 250.00 |
| | | | Secretary, Interpreter | $ 575.00 |
| | | | Commissions | $ 4,371.00 |
| 78 | May 30, 1965 | Ernst Weimann | Travel, Europe, United States and Return | $ 2,172.00 |
| | | | Commissions | $ 4,567.50 |
| 79 | May 31, 1965 | Franco Corelli | Commissions | $22,573.50 |
| 80 | June 4, 1965 | Sandor Konya | Claque | $ 1,250.00 |
| | | | Secretary, Interpreter | $ 2,050.00 |
| | | | publicity and promotion | $ 4,459.29 |
| | | | commissions | $13,050.00 |
| 81 | June 15, 1965 | Jon Vickers | Commissions | $ 9,757.50 |
| | | | Publicity | $ 1,896.00 |
| 82 | June 25, 1965 | Renata Tebaldi | Theatrical Equipment | $ 1,844.89 |
| | | | Claque | $ 2,200.00 |
| | | | Professional Training, Coaching | $ 2,200.00 |
| | | | Commissions | $17,671.50 |

*Appendix C*

| *Count* | *Date* | *Taxpayer* | *Deduction Items* | *Amount* |
|---|---|---|---|---|
| 83 | Dec. 1, 1965 | Raina Kabawanska | Secretary, | $ 350.00 |
| | | | Interpreter Theatrical | $ 225.00 |
| | | | Equipment Commissions | $ 3,000.00 |
| 84 | Dec. 23, 1965 | Monserrat Caballe | Accompanist | $ 131.25 |
| | | | Publicity | $ 2,011.38 |
| | | | Commissions Promotion | $ 4,000.00 |

(Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 2.)

COUNTS EIGHTY-FIVE THROUGH EIGHTY-EIGHT

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Norman H. Egenberg, the defendant, unlawfully, wilfully and knowingly did aid and assist in, procure, counsel and advise the preparation and presentation to the District Director of Internal Revenue for the Manhattan District of New York, under and in connection with matters arising under the Internal Revenue laws, to wit, Title 26, United States Code, of returns, statements and other documents, to wit, United States Departing Alien Income Tax Returns (Form 1040 (c), United States Treasury Department, Internal Revenue Service) for taxpayers, as hereinafter set forth, which were fraudulent and false as to material matters, in that they represented that such taxpayers had received

income during the taxable period as hereinafter set forth in the amounts hereinafter set forth, whereas in truth and in fact, as the defendant well knew, such taxpayers had received income in excess of such amounts:

| *Count* | *Date* | *Taxpayer* | *Taxable Period* | *Amount* |
|---|---|---|---|---|
| 85 | Mar. 24, 1965 | Christa Ludwig | January 1, 1965 to March 24, 1965 | $ 7,258.14 |
| 86 | May 2, 1965 | Ernst Haefliger | January 1, 1965 to May 2, 1965 | $ 3,000.00 |
| 87 | Apr. 25, 1965 | Ballet Folklorico De Mexico—members of touring company | January 1, 1965 to April 25, 1965 | $130,717.50 (total for all returns) |
| 88 | Dec. 23, 1965 | Monserrat Caballe | January 1, 1965 to December 23, 1965 | $ 13,200.00 |

(Title 26, United States Code, Sections 7206(2) and 2, and Title 18, United States Code, Section 2.)

.....

Foreman

ROBERT M. MORGENTHAU
United States Attorney